

Department of Labor and Industry
Board of Personnel Appeals
PO Box 6518
Helena, MT 59604-6518
(406) 444-2718

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 14-2006

PAUL BRUNELL, HOUSEKEEPING)
DEPARTMENT, AFFILIATED WITH THE)
INDEPENDENT LOCAL #5070 AND THE)
MEA-MFT, NEA, AFT, AFL-CIO)
Complainant,)

-vs-

INDEPENDENT UNION LOCAL NO 5070)
EXECUTIVE BOARD, AND THE MEA-)
MFT REPRESENTATIVE, AFFILIATED)
WITH THE MEA-MFT, NEA, AFT, AFL-)
CIO)

Defendant.

INVESTIGATIVE REPORT
AND
NOTICE OF INTENT TO DISMISS

I. Introduction

On December 14, 2005, Paul Brunell, an employee of the housekeeping/laundry department at the Warm Springs State Hospital filed an unfair labor practice charge with the Board of Personnel Appeals alleging that the defendant violated Section 39-31-201 and Section 39-31-402(1) by failing to properly represent him. Mr. Brunell is not represented by counsel. The defendant is represented by, J.C. Weingartner, counsel for MEA-MFT, and the affiliated local. The defendant has denied any violation of the law.

Michael Furlong was assigned by the Board to investigate the charge, however, Mr. Furlong is no longer available to conduct the investigation. John Andrew was therefore appointed to investigate the matter, has reviewed the submissions of the parties and has communicated with both Mr. Brunell and Mr. Weingartner.

II. Discussion

The Board of Personnel Appeals has jurisdiction over this matter. The Montana Supreme Court has approved the practice of the Board of Personnel Appeals in using Federal Court and National Labor Relations Board (NLRB) precedent as guidelines in interpreting the Montana Collective Bargaining for Public Employees Act, State ex rel.

1 Board of Personnel Appeals vs. District Court, 183 Montana 223 598 P.2d 1117, 103
2 LRRM 2297; Teamsters Local No. 45 vs. State ex rel. Board of Personnel Appeals, 185
3 Montana 272, 635 P.2d 185, 119 LRRM 2682; and AFSCME Local No. 2390 vs. City of
4 Billings, Montana 555 P.2d 507, 93 LRRM 2753. To the extent cited in this decision,
5 federal precedent is considered applicable.
6

7
8 A threshold issue raised by Mr. Brunell is the late response of the defendant to
9 the summons issued in this matter. The rule in question, ARM 24.26. 680B (2)
10 provides that the answer to an unfair labor practice charge is to be filed within 10 days.
11 ARM 24.26.681 provides that in the instance of a late response to a finding of probable
12 merit the board “may consider it an admission of material facts and a waiver of a
13 hearing”. ARM 24.26.681 applies to a late response to a finding of probable merit. It
14 does not apply to a late response to a summons. There is no rule that specifically
15 addresses a late response to an unfair labor practice summons. To be sure an
16 investigator of an unfair labor practice could consider late response in the context of
17 cooperation with the processing of the investigation and the overall conduct of a
18 defendant. However, it certainly would not be grounds for an adverse ruling, particularly
19 when even if a finding of probable merit is made an adverse ruling for late response is
20 only permitted, and not mandated. Mr. Brunell’s objection is correctly founded as it is
21 noted that the answer to the summons was not timely filed. However, the late filing
22 should not decide the merit of the complaint. In fact, the defendant did respond and has
23 been cooperative in the investigation.
24

25
26 The thrust of Mr. Brunell’s charge is that the union, although slow in doing so,
27 has advanced the classification appeal of only some of the union members, namely the
28 Psych Tech classification, but it has failed to advance the classification appeals of other
29 employees in other classifications in the bargaining unit. In the course of this Mr.
30 Brunell further contends that at the request of MEA-MFT field representative Todd
31 Lovshin Mr. Brunell gathered the names and signatures of other employees in other
32 departments who were not included with the names and information given by the psych
33 techs to Mr. Lovshin. It is unclear when this happened but by Mr. Brunell’s reckoning it
34 was “(2+ years)” in the past. Mr. Brunell further contends that at some point he was told
35 by e-board member Marie Holbrook that hospital CEO Ed Amberg had told her that a
36 classification appeal could be filed by only one department at a time. Mr. Brunell then
37 talked to Mr. Amberg directly and offers that Mr. Amberg told him he never said this. As
38 a result of all this Mr. Brunell believes the union has breached its obligation to fairly
39 represent all members of the bargaining unit, including those in his classification as well
40 as all others.
41

42 As further proof of his complaint Mr. Brunell offers an article from a local union
43 newsletter, the date of which is not known, but which states:

44 WHAT ABOUT THE PSYCH TECH UPGRADE?

45 LADIES AND GENTLEMEN, PLEASE BE PATIENT AS WE ARE STILL
46 STRIVING FOR OUR MUCH NEEDED UPGRADE. ED AMBERG IS DOING
47 HIS UTMOST TO SUPPORT OUR QUEST. HOWEVER, WE WOULD VASTLY
48 IMPROVE OUR CHANCES OF MAKING IT A REALITY IF WE HAD
49 INCREASED SUPPORT FROM OUR MEMBERS. MEETING IS NOVEMBER 1,
50 2005. WE HOPE TO SEE YOU THERE. IF YOU HAVE ANY QUESTIONS
PLEASE BRING THEM TO THE NEXT MEETING OR FEEL FREE TO

1 CONTACT ANY MEMBER OF THE E-BOARD AND WE WILL HELP YOU IN
2 ANY WAY WE CAN.
3

4 Mr. Brunell's contention is that this article is evidence that the psych tech
5 classification appeal has gone forward yet nothing else has gone forward other than the
6 psych techs. In the view of Mr. Brunell this represents some sort of breach on the part
7 of the e-board to adequately represent all the members of the bargaining unit.
8

9 Because another law, the one addressing employee wage and classification
10 appeals, is implicated in this charge it is important to look to rules defining portions of
11 that process in order to assess the merits of the unfair labor practice charge. The rules
12 on classification appeals provide in part that:
13

14 Any employee, group of employees, or appropriately designated representatives,
15 may utilize this formal grievance procedure . . . ARM 24.26.508(1)
16

17 The rules go on to define issues that can be appealed. They are defined as:
18

19 (c) Pursuant to section 2-18-203(2), MCA, the grade assigned to a class is not an
20 appealable subject. The appeal shall be described in terms of the following
21 appealable issues:
22

- 23 (i) substantial changes have occurred in this position to warrant reclassification.
24 Specifically, this position should be allocated to (list class code and class title);
25 (ii) this position was incorrectly allocated to (list class code and class title) and
26 should be allocated to (list class code and class title);
27 (iii) pursuant to point factoring methodology, inappropriate levels have been
28 assigned to the following factors: (list all applicable factors);
29 (iv) The pay plan rules have been incorrectly applied to this position (specific
30 rule(s) should be cited); and
31 (v) Other - issue must specifically relate to position classification.
32

33 The rules than define the three step procedure used to process classification
34 appeals including the initial response of the department head or designee, a step two
35 appeal to the state personnel division and a step three appeal to the Board of Personnel
36 Appeals.
37

38 As a part of the investigation of this unfair labor practice Mr. Brunell told the
39 investigator that he was advised by Todd Lovshin that individual employees, including
40 Mr. Brunell, could file classification appeals on their own. They did not have to go
41 through the union.
42

43 Included in the classification appeal process is a process to address multiple
44 appeals. That rule provides:
45

46 24.26.513 CONSOLIDATED APPEALS (1) If the facts of several given appeals
47 affect a large number of employees in the same manner, the board may
48 designate the appeals as a consolidated appeal - ARM 24.26.513 (1).
49
50

1 The rule further provides:
2

3 In a case designated as a consolidated appeal by the board or its designee, the
4 appeal shall begin at step one of the formal appeals procedure provided in ARM
5 24.26.508 – ARM 24.26.513 (3).
6

7 With this background it appears that at some indefinite period in time employees
8 began a process to have positions at the Warm Springs Hospital reclassified. From that
9 point forward the facts are disputed as to whether there was sufficient information
10 submitted by the various classifications of employees to warrant an appeal under the
11 classification rules. It is the contention of Mr. Brunell that there was. He further
12 contends that the classification process was never followed through by either the
13 executive board of the local or by the MEA-MFT representative assigned to the local.
14 From the perspective of the defendant, they never got all the information they needed to
15 file an appeal for all the classifications in the hospital. The exception was the psych
16 techs. Psych techs are currently designated as a consolidated appeal by the Board of
17 Personnel Appeals and the appeal is currently under review by the hospital
18 administration at step 1. The MEA-MFT is actively involved in the processing of that
19 appeal. The remainder of the employees in the hospital are not subject to an appeal at
20 this time although the status of any such action and whether there is sufficient
21 information to perfect an appeal as this point seems rather up in the air. Certainly there
22 is nothing to say that an appeal could not be filed under the appropriate rule, only that
23 for whatever reason none is filed thus far.
24

25
26 Classification appeals are seldom easy and they are typically never quickly
27 resolved. They involve the gathering of large quantities of information, identifying the
28 appealable issue or issues, exchanging information between the employees and the
29 administration and a general sorting out of duties and responsibilities. In the case of
30 large groups of employees with overlapping duties and responsibilities the task is even
31 more daunting and can take long, often frustrating amounts of time to accomplish. To
32 be sure, that is the case at the hospital as there are many people involved and several
33 classifications that seem to have interaction with patients. To be equally sure, this
34 process has gone on for a long time. Whether there is fault for this is an issue
35 presented to the Board of Personnel Appeals. Certainly Mr. Brunell believes the union
36 is the problem just as the union might think that Mr. Brunell and others may not have
37 actively participated and/or not provided all that is needed to advance the classification
38 appeal/s at this point in time. Perhaps all of this could have been handled differently
39 and perhaps more efficiently, but that is not the true issue before the Board of
40 Personnel Appeals. The real question before the Board is whether an unfair labor
41 practice was committed in the course of developing a classification appeal/s.
42
43

44 Under 39-31-402 (1) Montana Code Annotated it is an unfair labor practice for a
45 labor organization to restrain or coerce employees in the exercise of the right
46 guaranteed in 39-31-201 or a public employer in the selection of his representative for
47 the purpose of collective bargaining or the adjustment of grievances. 39-31-201 MCA
48 guarantees public employees the right of protected self organization free from
49
50

1 interference, restraint or coercion. Mr. Brunell's contention that the union somehow
2 interfered or restrained individuals when an e-board member allegedly misrepresented
3
4 the position of Ed Amberg is at the heart of this belief as is the manner in which the
5 classification appeal process has progressed.
6

7
8 Two U.S. Supreme Court decisions are helpful in analyzing the duty of fair
9 representation. In Vaca v. Sipes, 386 U.S. 171 the court held in part that a violation
10 of the duty of fair representation occurs when the union's "conduct toward a member is
11 arbitrary, discriminatory, or in bad faith". The Court then allowed a union a wide range
12 of discretion in processing contractual grievances, all subject to a requirement that the
13 union act in good faith. The Court in language contained in Hines v. Anchor Freight
14 Motors, 424 U.S. 554, stated that "the burden of demonstrating breach of duty by the
15 Union . . . involves more than demonstrating mere errors in judgment . . .". In a Ninth
16 Circuit case, Price v. Southern Pacific Transportation Company, 586 F2d. 550 (1978),
17 again addressing the processing of contractual grievances the court stated:
18

19 The record provides no showing of ill will, prejudice, or deliberate bad faith on the
20 part of the Union . . . Nor does it show unintentional conduct "so egregious, so far
21 short of minimum standards of fairness to the employee and so unrelated to
22 legitimate union interests to be arbitrary".
23
24

25 In the case brought by Mr. Brunell the issue is the handling of a classification appeal – a
26 statutory right conferred on all employees of the State of Montana. This is not a case
27 where the allegation is that a contractual grievance has not been processed properly.
28 Mr. Brunell does not have to go through his union to file a classification appeal. He was
29 told this by Mr. Lovshin, but he chose not to file on his own. Rather, and perhaps
30 understandably, he chose to have his union handle the classification appeal, as it has
31 done for the psych techs and as it appears to be working on for Mr. Brunell and others
32 employed at the hospital. There has been no showing by Mr. Brunell that the union has
33 interfered with, discriminated against, coerced or in any way intimidated him or others at
34 the hospital in exercising their rights, either under the collective bargaining agreement
35 or applicable law. It is not to say Mr. Brunell and others do not have the right to believe
36 their complaints have not been handled well, only that what has been offered to this
37 investigator does not rise to the level of an unfair labor practice on the part of the union
38 or it's executive board.
39
40

41 **III. Recommended Order**

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43 It is hereby recommended that the relief requested by the complainant, a ruling in
44 his favor based on a failure to timely respond under ARM 24.26. 680B (2), be denied.
45

46 It is hereby further recommended that Unfair Labor Practice Charge 14-2006 be
47 dismissed.
48
49
50

1 DATED this 3rd day of February 2006.
2
3

4 BOARD OF PERSONNEL APPEALS
5
6

7
8 By: /S/ John Andrew
9 John Andrew
10 Investigator
11
12
13
14

15 NOTICE
16

17 Pursuant to 39-31-405 (2) MCA, if a finding of no probable merit is made by an agent of
18 the Board a Notice of Intent to Dismiss is to be issued. The Notice of Intent to Dismiss
19 may be appealed to the Board. The appeal must be in writing and must be made within
20 10 days of receipt of the Notice of Intent to Dismiss. The appeal is to be filed with the
21 Board at P.O. Box 6518, Helena, MT 59604-6518. If an appeal is not filed the decision
22 to dismiss becomes a final order of the Board.
23
24
25
26

27 * * * * *

28 CERTIFICATE OF MAILING
29

30 I, /S/ Jennifer Jacobson, do hereby certify that a true and correct copy of this
31 document was mailed to the following on the 3rd day of February 2006 postage paid
32 and addressed as follows:
33
34
35

36 PAUL BRUNELL
37 C/O HOUSKEEPING/LAUNDRY DEPT
38 WARM SPRINGS STATE HOSPITAL
39 WARM SPRING MT 59756
40

41 JC WEINGARTNER
42 MEA-MFT
43 1232 EAST SIXTH AVENUE
44 HELENA MT 59601
45
46
47
48
49
50